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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD WILLARD ROSTAMO,

Defendant and Appellant.

C060198

(Super. Ct. No. CM029255)

A jury found defendant Ronald Willard Rostamo guilty of battery with serious bodily injury and attempted vehicle theft. The trial court found he had served two prior prison terms and sentenced him to five years and four months in prison.

Defendant appeals, contending: (1) the court erred in responding to the jury's question during deliberations, and counsel was ineffective for failing to object; and (2) there was insufficient evidence to support his conviction for battery with serious bodily injury because he was acting in self-defense. Disagreeing with these contentions, we affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

Kevin Haddock and Dixie Ann Hawks were "life partners" who had been living together on Lucky John Road in the City of Paradise for 13 or 14 years. Defendant was Hawks's son, who was about 30 years old when Haddock and Hawks started dating and lived on the property occasionally. Haddock's relationship with defendant was "sometimes kind of scary." Prior to the charged acts, there were two confrontations between them over defendant's theft of Haddock's property.

The first confrontation occurred in 2005 and involved an old pickup. Haddock and Hawks purchased a 1976 Dodge pickup that had problems passing a smog test. They "got a junk slip on it" and decided to use it on their property since it was not "street authorized." Once, defendant drove the pickup off the property without permission. To prevent defendant from doing it again, Haddock removed the rotor from the distributor of the pickup. The next day, defendant kicked in the door to the house, shoved Hawks "trying to get to" Haddock, and started "ranting and raving," threatening to kill Haddock. Defendant demanded the rotor. After several minutes of defendant screaming and threatening Haddock, Hawks said, "'It's not worth it. Give him the rotor.'" Haddock "tossed it to him and he left."

The second confrontation occurred in 2007 and involved a Geo Storm. Defendant wanted a ride from Haddock, and Haddock refused because the car had mechanical problems and was not registered. Defendant convinced Hawks to take him, but Haddock

explained he did not want the car being driven. Defendant "started screaming at [Haddock] and flipping out." Haddock said he was going to call the police, but defendant threatened to kill him if he did, so Haddock decided not to. Defendant then pinned Haddock against the car, screamed profanities at him, and pushed him 40 to 50 feet off the property.

As a result of these two confrontations, Haddock believed defendant was "extremely dangerous," and he feared for his safety.

On March 13, 2008, the charged acts occurred. Shortly before midnight, Haddock awoke to the sound of a motorcycle "trying to start up." He suspected defendant might be trying to steal his motorcycle and recalled that his keys had disappeared a few days prior when defendant had been around the property. When Haddock looked in the yard, his motorcycle was gone. Haddock awakened Hawks, thinking she would be better able to deal with defendant. Haddock grabbed a flashlight because there were no lights around the property, and Haddock and Hawks went outside.

Haddock and Hawks saw defendant on the motorcycle outside the gate of their property (over 80 feet from where Haddock had parked it) wearing Haddock's new \$200 helmet. Defendant was trying to start the bike. Hawks ran up to defendant and asked what he was doing. Defendant looked right at Haddock and said, "'Stealing your bike.'" Haddock pulled the keys out of the ignition and told him to get off the bike. Defendant did not respond. Haddock again told him to get off the bike, as did

Hawks. Defendant "just sat there." He then removed the helmet and "chucked it about 20 feet . . . into the middle of the road." Haddock again told defendant to get off the bike. Haddock "started feeling like there was going to be a confrontation," so he just "backed off." He then decided if there was going to be a fight, he "needed to get the upper hand."

Haddock "jab[bed]" defendant in the forehead with the flashlight, causing defendant to bleed. The jab was not hard enough to knock defendant off the bike, and he was still conscious and able to talk. Haddock told him "another time or two" to get off the bike. Defendant "stayed there." Haddock then grabbed defendant by the back of his collar, slapped him with the side of the flashlight, and pulled him off the bike. Now on the ground, defendant scrambled to get back on his feet. Haddock told him, "'I guess it looks like you want to go for round 2.'" Defendant "rant[ed] and rav[ed] he was going to kill [Haddock]" and was "'going to get [him].'" He then started attacking Haddock. He tried to kick and punch Haddock and succeeded in wrestling him to the ground. Defendant was now on top of Haddock and was pushing down on Haddock's throat with his forearm, cutting off Haddock's air supply for a couple seconds. Haddock tried to grab defendant's throat, but defendant swept Haddock's arms aside and bit Haddock's upper lip. While Haddock was still on the ground, defendant beat him with the flashlight and helmet. Defendant also kicked him, possibly breaking

Haddock's rib. Haddock could not get off the ground because defendant's pit bull had grabbed him by the ankle.

Eventually, Hawks got between defendant and Haddock, and Haddock retreated to the house. Hawks remained outside and tried to calm defendant down. Haddock could hear defendant coming and saying things like, "'I'm going to get you.'"

Hawks left for a nearby market to call police. Haddock decided to "get out of there" on his motorcycle and stopped three police cars for help.

Haddock ended up at the hospital and was treated for his injuries. He had 11 stitches on his lip. The wound runs from his nostril down to his lip and the evidence of human bite marks is still visible. He has a crooked smile and can no longer grow a mustache. He broke a bone in his hand, necessitating a splint. He has puncture wounds around his ankle from the dog bites and needed a tetanus shot.

Defendant had a silver-dollar sized abrasion to his forehead and a fracture to his jaw.

#### DISCUSSION

##### I

*Defendant's Contention Regarding The Court's  
Response To A Jury Question Was Forfeited, And  
Counsel Was Not Ineffective For Failing To Object*

Defendant contends the court violated his federal constitutional rights to be present and to counsel when the court responded on its own to a jury question regarding a readback of Haddock's testimony. He further contends counsel

was ineffective for failing to object when he learned of the readback. He claims the court's error requires either automatic reversal of his convictions or reversal under a harmless error standard of review. As we explain, we find the contention forfeited and counsel's performance adequate.

A

*Facts Relating To The Readback*

In the morning of the second day of deliberations, the jury sent the court the following note: "We would like to see the written record of Kevin Haddock[']s testimony from the first day of the trial."

The court responded in writing as follows: "The Court Reporter from Monday, June 2, is not available today. We are attempting to contact her and will keep you advised on her availability. Please continue deliberations and utilize your collective memory to see if you can collectively agree on Mr. Haddock's testimony."

The court then followed up with another note: "We have located the Court Reporter. She can be available at 1:30 pm for read back. She will be calling in at about Noon to see if she can come to Court. Please let us know what you wish to do."<sup>1</sup>

At 11:09 a.m., the jury reached a verdict. Before bringing the jury into the courtroom, the court informed the parties of the readback request:

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<sup>1</sup> The record does not disclose the timing of these three notes.

"THE COURT: [¶] . . . [¶] There was a request for read back for Mr. Haddock's testimony on Monday. Tammy Phillips was the Court Reporter on Monday. I sent a note back, without consulting counsel, to the effect that Tammy was not in the building, that we would try to locate her, and that they should continue deliberating and try to use their collective memories to rebuild that testimony.

"A few minutes later, we found out Ms. Phillips was in Glenn County, would be there at noon, available here at 1:30. We advised the jury of that in another note, and at the same time I asked the bailiff to take their lunch order. They indicated they did not want their lunch order, and that they did not need read back, and that's about the end of it. [¶] Any comments?

"[DEFENSE COUNSEL]: No.

"THE COURT: All right. You can bring the jury in now."

B

### *The Alleged Claim Of Error Was Forfeited*

#### *By Counsel's Failure To Object*

A criminal defendant forfeits a claim of error based on ex parte communication between the judge and jury by failing to object or move for mistrial. (*People v. Jennings* (1991) 53 Cal.3d 334, 384; *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.) "Moreover, it is questionable 'whether a defendant should be permitted to sit back, await a jury verdict, and then assert error based on the court's improper communication with

the jury' [citation], at least when the improper communication was relatively minor." (*Jennings*, at p. 384.)

In *Jennings*, the trial court communicated on its own with the jury foreman "about how the jury should go about their [sic] deliberations" and with another juror about what an "11 to 1 decision" would mean. (*People v. Jennings*, *supra*, 53 Cal.3d at p. 382.) The morning after the ex parte communication, the court told the prosecutor and the defense counsel and invited objections. (*Id.* at p. 383.) There were none. (*Ibid.*) On appeal, the defendant claimed constitutional error based on the ex parte communication and argued the issue was "nonwaivable and reversible per se." (*Ibid.*) The Supreme Court held that the "failure to object precludes assertion of the error on appeal." (*Id.* at p. 384) "Although the trial court should have deferred answering the question until both the prosecutor and defense counsel could be notified, its response was a correct statement of law and it gave the parties prompt notice of its misstep. (*Ibid.*, fn. omitted.)

*Jennings* controls here, despite defendant's contention the error was not forfeited. The crux of the court's ex parte communication with the jury had to do with a procedural matter of locating the court reporter. The only substantive matter was the court's comment to "utilize your collective memory to see if you can collectively agree on Mr. Haddock's testimony." This was a correct statement of law and was consistent with jury instructions that the jury's role was to "decide what the facts are in this case" using "only the evidence that was presented in



the courtroom.” When the court reporter was located, the jury said it did not need the readback. This was in the jury’s province to decide. On this record, we find defendant’s failure to object forfeits the assertion of error.

This leaves defendant’s assertion of ineffective assistance of counsel for failure to object, which requires he prove deficient performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 690-692 [80 L.Ed.2d 674, 695-696].) Since we have found the court’s statements were correct as a matter of law, counsel was not deficient for failing to object.

## II

*There Was Sufficient Evidence To Support Defendant’s  
Battery Conviction Because A Reasonable Jury Could Conclude  
Haddock Used Reasonable Force To Protect His Property And  
Defendant At No Point Was Acting In Self-Defense*

In two related arguments, defendant challenges the sufficiency of evidence to support his conviction for battery with serious bodily injury. First, he claims “no rational trier of fact could have rejected [his claim of self defense].” Second, he claims the fight had “two distinct stages” and Haddock was injured during the first stage when defendant was acting in reasonable self-defense. Both arguments fail because there was sufficient evidence Haddock was using reasonable force to protect his property and defendant was not acting in self-defense at any point during the incident.

We begin by explaining the two concepts at play here, on which the court instructed. The first was a property owner’s

right to defend his property and the second was an accused's right to act in self-defense.

A property owner may use "[a]ny necessary force" to protect his property "from wrongful injury." (Civ. Code, § 50.) This has been interpreted to allow the use of "such force as would have appeared to be necessary to a reasonable [person] in all of the circumstances, knowing what the [property owner] knew, and facing the facts which presented themselves at the time to the [property owner]." (*Boyer v. Waples* (1962) 206 Cal.App.2d 725, 727.)

Juxtaposed with this right to protect one's property is a defendant's right to act in self-defense, which "negates culpability for assaultive crimes." (*People v. Adrian* (1982) 135 Cal.App.3d 335, 340.) To justify acting in self-defense, the defendant must: (1) have reasonably believed he was in imminent danger of suffering bodily injury; (2) have reasonably believed he must use immediate force to defend against the danger; and (3) have used no more force than was reasonable under the circumstances. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065; see also CALCRIM No. 3470.)

Here, viewed in the light most favorable to the verdict, there was sufficient evidence from which a jury could have found Haddock used the amount of force that appeared necessary to protect his property and defendant did not reasonably believe he had to use immediate force to defend against injury and used more force than was reasonably necessary under the circumstances.

On the night of the charged crimes, defendant was attempting to steal, yet again, another vehicle from Haddock. Haddock's past experience with defendant's theft of his property, which was relevant to assessing the present situation, involved defendant breaking down a door to get at Haddock, repeatedly threatening to kill Haddock, pinning him against a car, and forcibly removing him from his own property.

Against this backdrop, Haddock still tried to reason with defendant when faced with the theft of his motorcycle. He asked defendant multiple times to get off the bike, but defendant would not budge. Instead, he "chucked" Haddock's helmet into the middle of the road. Still trying to reason with defendant, Haddock again told defendant to get off the bike and even tried backing off to avoid a confrontation. Only when he realized nothing was working did Haddock jab defendant in the forehead with a flashlight. The force was not enough to knock defendant off the bike or knock him unconscious. Haddock gave defendant yet more chances to comply with his requests to get off the bike, but defendant simply would not. Only then did Haddock forcibly remove defendant from the bike, slap him with the side of the flashlight, and comment that defendant looked like he "want[ed] to go for round 2." At this point, defendant became enraged, threatened to kill Haddock, attacked him, cut off his air supply, bit and disfigured his lip, and beat him with the flashlight and helmet.

From these facts, a reasonable jury, and indeed the one here, could have concluded Haddock acted reasonably in

protecting his property and defendant did not reasonably believe he had to use immediate force to defend against the danger of bodily injury and used more force than was reasonable. Haddock demonstrated he did not want to use force against defendant to get his motorcycle back by repeatedly asking defendant to get off the bike. It was defendant who kept goading him to use force by refusing repeated requests to get off the bike. Moreover, when Haddock did use force against defendant to get his bike back, defendant upped the ante by his threats of death and acts of physical violence such as cutting off Haddock's air supply that seemingly followed up on those threats. Given these facts, defendant's arguments fail.

DISPOSITION

The judgment is affirmed.

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ROBIE, J.

We concur:

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SCOTLAND, P. J.

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NICHOLSON, J.